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Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matters of

Rulemaking To Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Band and to Establish Rules and Policies for Local Multipoint Distribution Service;

Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules.

CC Docket No., 92-297

RM-7872; RM-7722

OPPOSITION TO PETITION FOR RECONSIDERATION

Suite 12 Group ("Suite 12"), by its attorneys, pursuant to Section 1.429(f) of the Commission's rules, hereby files this opposition to the Petition for Reconsideration filed by Video/Phone Systems, Inc. ("Video/Phone"), in the above-captioned rulemaking (the "Petition"). This Petition seeks reconsideration of the Commission's decision in its Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration issued in the above-captioned proceeding (hereinafter collectively referred to as the "Notice"), "wherein the Commission denied all pending waiver applications for use of the 27.5 - 29.5 GHz frequency band for

 $^{^{1/}}$ CC Docket No. 92-297, FCC 92-538, 58 Fed. Reg. 6376 (Jan. 28, 1993).

Local Multipoint Distribution Service ("LMDS"), see $\P\P$ 51 - 53 of the Notice. For the reasons set forth below, the Petition should waivers itself; rather, it claims that ". . .through related companies, [it] had filed requests for waiver and applications to provide LWBS in the 28 GHz band." However, neither in the Petition nor in Mr. Don Franco's attached "Statement" is the relationship between Video/Phone and those "related companies" specified. In fact, Video/Phone does not state the name of the "related companies" anywhere in the Petition. The only place these "related companies" are mentioned is in a footnote in Mr. Franco's "Statement." Suite 12 suggests that this defect in Video/Phone's Petition makes it impossible for the Commission to determine exactly what type of relief is appropriate for Video/Phone or if Video/Phone is entitled to any relief whatsoever. Accordingly it cannot be found that Video/Phone has standing to file a Petition For Reconsideration, and its Petition should be dismissed.

III. A HYE CREST-TYPE WAIVER IS INAPPROPRIATE

3. The waivers, which are the subject of the Petition for Reconsideration (see Notice, ¶¶ 51 - 53), seek a license similar to that granted in Hye Crest Management, Inc., 6 FCC Rcd 332 (1991). In approving the Hye Crest license, the Commission noted that Hye Crest would "bring a new and needed multichannel video service to New York City." The Commission authorized Hye Crest to deliver

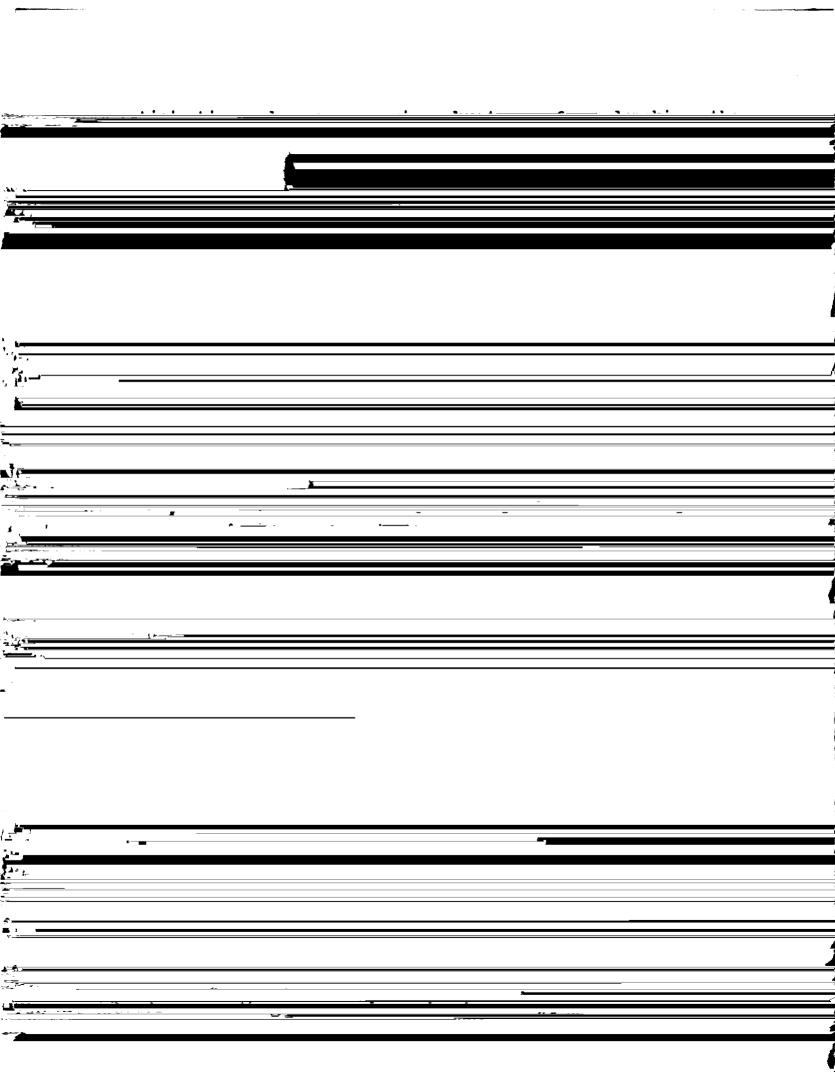
one-way signals in competition with cable television. Local Multichannel Distribution Service ("LMDS"), as proposed in the Notice, involves a much broader, almost unlimited, array of two-way video, voice and data services, including HDTV, PCS, Interactive Television and more. Unlike the Hye Crest video service, which involves just 49 channels, LMDS contemplates literally thousands of different "channels" providing an assortment of services. Therefore, a Hye Crest-type waiver operation would not be compatible with LMDS as proposed in the Notice, and waivers seeking a Hye Crest-type of license would be totally inconsistent with LMDS as contemplated in the Notice. Accordingly, the Commission was correct in denying those waivers in view of the proposals in the Notice.

IV. GRANT OF THE WAIVERS WOULD RESULT IN A DE FACTO REALLOCATION OF SPECTRUM

4. The change of policy proposed by the waiver applicants should take place in the context of a rulemaking rather than a series of waivers. 47 To avoid the evisceration of the Commission's allocation procedures, and to take advantage of the broad public

^{3/}Under its present Experimental license for New York City, Suite 12 has demonstrated a solid state transmitter/transceiver, smaller cells or repeater applications with 99.99% availability for two-way voice, video and data communications.

^{5/}See, for example, Lee Optical, Memorandum and Opinion and Order, 57 RR 2nd 1296, 1298 at ¶ 6 (1985); Resolution of Interference Between UHF Channels 14 and 69 and Adjacent-Channel Land Mobile Operations, Notice of Proposed Rulemaking/Notice of Inquiry, 2 FCC Rcd 7328, 7335 at Note 21 (1987).



provide video conferencing using Suite 12's technology; 971 separate waiver applications were filed for the 28 GHz band; and, the Commission issued the Notice.

- 7. Given the intensity of this activity, the Commission was well advised to address the appropriate use of this spectrum via notice and comment rulemaking, rather than by ad hoc waiver applications, such as those which are the subject of the Petition. Indeed, the breadth and the scope of the waiver applications themselves justified a rulemaking proceeding. By seeking authority to operate a non-conforming service in many cities throughout the United States pursuant to waiver, those filing petitions for reconsideration are attempting to draw the Commission into a procedurally irresponsible position of reallocating the 28 GHz band without a rulemaking.
- 8. Finally, it should be noted that, as the innovator of LMDS, Suite 12 invested substantial time and resources in this endeavor. In return, the Commission, in the Notice, has tentatively awarded Suite 12 a pioneer's preference for its efforts. If the Commission grants waiver requests and converts those waiver authorizations into regular LMDS authorizations, then everyone who is granted a waiver gets a pioneer's preference just for filing a "me too" waiver application. Moreover, Section 21.19 of the Commission's rules requires, among other things, that a waiver request illustrate the "unique facts and circumstances of a

particular case." In the case of the waiver requests, since each of the applications was patterned after the Hye Crest request, there is nothing unique about any one of them.

V. IF THE COMMISSION RECONSIDERS ONE WAIVER, IT MUST RECONSIDER ALL THE WAIVERS

9. The Notice states, at paragraph 53, "We also see no basis for distinguishing among any of the individual requests in an equitable fashion." Suite 12 agrees and suggests that if the Commission reconsiders the waivers which are the subject of the Petition, it will have to reconsider the denial of all 971 waiver requests, since all of them are quite similar.

VI. MANY WAIVER APPLICATIONS ARE FLAWED

10. Suite 12 submits that many other waiver requests may also be flawed because they were filed after the 60-day cut-off period specified in the rules. Therefore, many other petitions for reconsideration may also be most and should be dismissed for that reason.

VII. CONCLUSION

11. As demonstrated above, the Commission's justification for denying the pending waiver applications is sound from both a legal and policy standpoint. Therefore, the Commission was completely justified in dismissing the waiver applications, and Video/Phone

has presented nothing in the Petition to cause the Commission to revisit its decision. Accordingly, the Petition should be denied.

Respectfully submitted,

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Dated: March 22, 1993

CERTIFICATE OF SERVICE

I, Laura M. Campos, hereby certify that I have, this 22nd day of March, 1993, caused a copy of the foregoing "Opposition To Petition For Reconsideration" to be sent, by U.S. first-class mail, postage prepaid, to:

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